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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 221 .

No. 222 .

MORRIS EISENBERG,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

HERMAN SCHAEFFER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. .

No. .

Morris Eisenberg, Petitioner,

v.

Commissioner of Internal Revenue.

Herman Schaeffer, Petitioner,

v.

Commissioner of Internal Revenue.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, MORRIS EISENBERG and HERMAN SCHAEFFER, by their attorneys, HIRSH W. STALBERG, ESQ., and SHAPIRO, CONNER, ROSENFELD and STALBERG, ESQS., respectfully pray that writs of certiorari issue to review

the orders, judgments and decrees of the United States Circuit Court of Appeals for the Third Circuit in the above entitled cases, affirming decisions of the Tax Court of the United States, which orders, judgments and decrees were rendered by the Circuit Court of Appeals on April 22, 1947.

The Tax Court rendered decisions against the petitioners, and filed a consolidated opinion, sustaining deficiencies assessed by the Commissioner for the years 1940 and 1941. On appeal, the Circuit Court likewise filed a consolidated opinion, but entered separate orders, judgments and decrees in the two cases, affirming the decisions of the Tax Court.

STATEMENT OF THE MATTER INVOLVED.

This case involves the taxability of trust income to the settlor, in a family partnership case, where the trust beneficiaries are minor children of the settlor.

Eisenberg and Schaeffer were partners in a furniture business under an oral agreement from early in 1937 to December 30, 1939 (R. 8, 9). On December 30, 1939, they entered into a written agreement of partnership which stated that it reduced to writing the terms of the oral partnership, under which they had been operating, and fixed the future term at a year, subject to automatic renewals in default of notice to the contrary (R. 9-12).

Under this written agreement the partners retained equal shares of capital (R. 10) and shared equally in profits and losses (R. 12). Each was entitled to draw $7800.00 per annum for services, the drawings not to be deducted from profits, but to be considered an expense of doing business (R. 11). Profits could not be distributed except by consent of all partners (R. 11).

On January 2, 1940, each partner created trusts for his respective minor children—one to each (R. 12). Each partner was the trustee in the trusts he created, with

broad powers of management and control in himself as trustee. Each partner distributed among the trusts one-half of his interest in the partnership, leaving Eisenberg holding a one-fourth share in the capital of the partnership; Schaeffer a one-fourth share; the Eisenberg trusts in the aggregate a one-fourth share; and the Schaeffer trusts in the aggregate a one-fourth share (R. 12-17).

On the next day, January 3, 1940, each trust became a partner in the business (R. 17). As of January 1, 1940, capital accounts were set up on the business books for each of the trusts reflecting the various assignments of fractional interests in the business to each (R. 17-19). The same written partnership agreement which had formerly bound Eisenberg and Schaeffer as partners now bound the trusts as well, under the same terms and conditions (R. 17).

Except for negligible sums, no profits were distributed to the trusts for the taxable years (R. 18). Federal gift tax returns reporting the gifts in trust were filed (R. 19).

In their respective income tax reports as trustees for the taxable years, Eisenberg and Schaeffer reported income of the partnership credited on its books to the trusts (R. 18).

The Commissioner's position is that Eisenberg and Schaeffer should be taxed individually on all net income of the partnership, including that attributable to the interests of the trusts (R. 23). The Tax Court upheld that position (R. 30, 31).

The Tax Court made no fact finding that either the trusts or the partnerships were invalid for tax purposes, although the Commissioner specifically contended that the settlors still remained the owners of the trust property and that no actual partnerships were created (R. 23, 24). The Tax Court did conclude as a matter of law that the tax should be imposed upon the petitioners (R. 23-27).

The Circuit Court affirmed the decisions of the Tax Court (R. 43, 44).

In its opinion, the Circuit Court quoted and affirmed the principle of United States *v.* Morss, 159 F. 2d 142 (CCA 1st, 1947), that a "grantor of a trust remains taxable on the trust income under Section 22(a) where the benefits directly or indirectly retained by him blend imperceptibly 'with the normal concepts of full ownership'" (R. 41).

The Circuit Court proceeded to declare that the Tax Court's determination, if supported by the facts, was conclusive (R. 41).

The Circuit Court then said (R. 42):

> "• • • it is sufficient that the rights retained enabled them" (the taxpayers) "to make distributions to the minor beneficiaries according to their discretion, and to continue to use both the corpus and the income of the trusts in the partnership business exactly as though they were the owners thereof, without right in the beneficiaries to receive any distribution until the termination of the trusts as hereinbefore mentioned."

The Circuit Court discounted the argument of the petitioners that they could have prevented distribution of the trusts only by denying distribution to themselves, and asserted that by adjustment of salaries the petitioners could siphon off all net income merely by executing a written agreement on or before the first of each year (R. 42). Hence, the Circuit Court declared, the Tax Court might reasonably conclude on the facts, as it did, that the arrangements made by the petitioners did not effect a change in their economic status, but multiplied in form a single economic unit (R. 42).

For the latter conclusion, the opinion of the Circuit Court cited Helvering *v.* Clifford, 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940), and Losh *v.* Commissioner, 145 F. 2d 456 (CCA 10th, 1944) (R. 42).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1141 of the Internal Revenue Code (53 Stat. 164; U. S. C. A., Title 26, Sec. 1141), and Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C. A., Title 28, Section 347).

The judgments of the United States Circuit Court of Appeals for the Third Circuit, to be reviewed, were entered on April 22, 1947 (R. 43, 44).

QUESTION INVOLVED.

Where a member of a partnership creates a trust for his minor children of a portion of his interest in the partnership, with himself as trustee and with broad powers of control as such trustee, and the trust becomes a member of the partnership, is the income of such a trust derived from partnership profits taxable to the settlor?

REASONS RELIED ON FOR ALLOWANCE OF WRITS.

In holding that income from gifts of partnership interests in trust for children of the partners is taxable to the partners creating the trusts, the Circuit Court of Appeals for the Third Circuit

1. has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter: Montgomery *v.* Thomas, 146 F. 2d 76 (5th Circuit); Commissioner *v.* Olds, 60 F. 2d 252 (6th Circuit); Armstrong *v.* Commissioner, 143 F. 2d 700 (10th Circuit); Thomas *v.* Feldman, 158 F. 2d 488 (5th Circuit);

2. has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named a full and complete transcript of the record and all proceedings had in these cases numbered and entitled on its docket October Term, 1946, Nos. 9139 and 9140, to the end that these cases may be reviewed and determined by this Court; that the said orders, judgments and decrees of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as may seem just and proper.

And your petitioners will ever pray.

HIRSH W. STALBERG,
SHAPIRO, CONNER, ROSENFELD & STALBERG,
By

HIRSH W. STALBERG,
Attorneys for Petitioners.

Supreme Court of the United States

October Term, 1947. Nos. .

Morris Eisenberg, Petitioner,

v.

Commissioner of Internal Revenue.

Herman Schaeffer, Petitioner,

v.

Commissioner of Internal Revenue.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Tax Court appears in the record at pages 7 to 29. It is reported in 5 T. C. 856.

The opinion of the Circuit Court of Appeals for the Third Circuit appears in the record at pages 34 to 43. It is reported in 161 F. 2d 506.

JURISDICTION.

The grounds on which jurisdiction of this Court is invoked are set forth in the Petition at page 5 thereof, and will not be repeated here.

STATEMENT OF THE CASE.

The statement of the case appears in the Petition at pages 2 to 4, and in the interest of brevity is not repeated herein.

SPECIFICATION OF ERRORS.

The errors which the petitioners will urge, if Writs of Certiorari be granted, are that the Circuit Court of Appeals for the Third Circuit erred

1. in affirming the judgment of the Tax Court;
2. in holding reasonable, despite the Tax Court's studied refusal to find that no actual partnership was created or that the petitioners remained the owners of the trust property, the conclusion of the Tax Court that the arrangements made by the petitioners did not effect a change in their economic status, but multiplied in form a single economic unit;
3. in holding invalid for tax purposes, despite the Tax Court's failure to find that there was no actual partnership or that the trusts did not effect a change of ownership, irrevocable trusts of portions of the interest of partners in a partnership business, executed by those partners for the benefit of their respective minor children.

STATUTE INVOLVED.

Sections 11, 12, 22(a), 181, 182, 183(a), and 3797(a) (2) of the Internal Revenue Code, Act of February 10, 1939, as amended, 53 Stat. 5, 9, 69, 70, 469; U. S. C. A. Title 26, Secs. 11, 12, 22(a), 181, 182, 183(a), 3797(a) (2).

ARGUMENT.

A. Reversal on Merits.

The Circuit Court, in upholding the conclusion that irrevocable trusts of partnership interests for children did

not relieve the settlors of income tax liability, proceeded upon the reasoning of cases involving the interests of wives.

Those cases are the now famous decisions of Helvering *v.* Clifford, 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940); Commissioner *v.* Tower, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. 670 (1946), and Lusthaus *v.* Commissioner, 327 U. S. 293, 66 S. Ct. 539, 90 L. Ed. 679 (1946).

None of those cases considers the rights of children as distinguished from those of wives in similar situations. None of those cases specifically rules that a trust for a child beneficiary may not legitimately form a component of a partnership for income tax purposes. That precise question has not been passed upon by this Court.

In some Circuits, where the question has arisen with respect to children, the courts have upheld gifts of interests in partnerships as valid under the Internal Revenue Code. One Circuit has so decided after the *Tower* and *Lusthaus* cases. Some Circuits have held the contrary.

In Armstrong *v.* Commissioner, 143 F. 2d 700 (1944), the Circuit Court of Appeals for the Tenth Circuit sustained a conveyance by the owner of a business of a fractional share to himself in trust for minor children, reserving broad powers of management and control.

In Montgomery *v.* Thomas, 146 F. 2d 76 (1944), the Circuit Court of Appeals for the Fifth Circuit recognized as valid a partnership composed of a father and his minor sons, even though the sons rendered no services and their only capital contributions comprised the dividends upon stocks bought with money received from their father as gifts.

In Commissioner *v.* Olds, 60 F. 2d 252 (1932), the Circuit Court of Appeals for the Sixth Circuit sustained gifts by a father to three daughters of shares in his business, though the father retained full control and the right to give his daughters, from time to time, what he saw fit out of the profits.

In Thomas *v.* Feldman, 158 F. 2d 488 (November 22, 1946), the Circuit Court of Appeals for the Fifth Circuit approved partnership trusts for minor children, even though the father retained full control of the partnership management. That case, it will be noted, was decided since the *Clifford, Tower* and *Lusthaus* cases.

In the last mentioned case, which was appealed from a Texas District Court, the father created limited partnerships, which included his wife and the trusts for minor children. The father remained the general and managing partner. The District Court found that the gifts creating the trust were bona fide, valid and irrevocable; and that since their creation the father had used none of the corpus or income of the trust either to maintain his children or for his personal benefit.

As to the wife, the Circuit Court declared that the validity of the partnership was not involved because the Texas community property law assigned one-half of the income of the husband to the wife irrespective of the partnership agreement.

As to the trusts, the Circuit Court distinguished the *Clifford, Tower* and *Lusthaus* cases, on the ground that they were not controlling, because of different fact findings below.

In the *Clifford* case, the Circuit Court pointed out, the Supreme Court held, upon the facts as found by the Board of Tax Appeals, that the benefits retained by the taxpayer blended with the normal concepts of full ownership, so that the fact finding to the effect that the husband remained the owner of the corpus could not be considered reversible error. As to the *Tower* and *Lusthaus* cases, the Circuit Court declared that those cases were not controlling because of the Tax Court's finding in each that the wife was not a genuine partner.

Under the reasoning of the *Feldman* case just discussed, it becomes exceedingly important to bear in mind that in the case at bar *there was no fact finding by the*

Tax Court that the trusts were invalid or that the partnership was a sham.

The Tax Court did conclude as a matter of law that the trusts were invalid for trust purposes.

Nevertheless, a legal conclusion is not the same as a fact finding. Since the courts have laid so much stress upon the findings of fact of the Tax Court or equivalent lower court, the distinction cannot be overemphasized.

In the light of that stress, the failure of the Tax Court in the case at bar to render a fact finding adverse to the trusts as members of the partnership becomes crucial.

This Court has not yet passed upon the validity, under the taxing statute, of gifts of partnership interests to children—as distinguished from wives.

In view of the multitude of family partnership cases, the question whether the doctrine of the *Tower* and *Lusthaus* decisions is to be extended to situations involving children is likely to be of considerable public interest.

It would seem important, therefore, that any doubts as to the validity or invalidity of partnerships with children be resolved by a definitive decision.

The rationale of the partnership and trust cases involving wives is that a division of a husband's property or income with his wife does not actually render the husband the poorer. Husband and wife are regarded as a single economic unit. The courts consider that a diversion of income from a husband to his wife does not deprive him of an economic benefit, and does not constitute an actual diversion.

That theory of unity has not thus far been extended by this Court to cover children. It is submitted that no such unity exists in their case.

In the matter at bar, there was no retention of income within the family groups. The petitioners had put permanently beyond them the enjoyment of the group income. The trusts provided for the accumulation of income for

the minors. Neither the petitioners nor the wives could receive that income. Presumably, the children would eventually marry and set up separate family establishments by the time they came into enjoyment of the trust income or corpus. The income thus would flow to different and independent family groups from that constituted by Eisenberg and his wife, or by Schaeffer and his wife.

On that reasoning, it is submitted, both the Tax Court and the Circuit Court erred in concluding that the arrangements made by the petitioners did not change their economic status but merely multiplied a single economic unit. The rationale of the *Clifford, Tower* and *Lusthaus* cases should not be carried to the point of governing the present case. A clear line of demarcation exists. That line, it is urged, should be maintained intact.

B. Remand for Fact Finding.

One further point remains to be considered. As has been brought out previously, the Tax Court made no fact finding as to whether or not the settlors still remained owners of the trust property, or as to whether or not the trusts actually became partners. That issue, as has already been argued, is vital in the case at bar. At the very least, therefore, this case should be remanded for a finding of fact by the Tax Court on that disputed issue.

Authority to that effect appears in a very recent case reported in the advance sheets of the Federal Reporter for July 7, 1947: Commissioner of Internal Revenue *v.* Stinchfield's Estate, 161 F. 2d 555 (C. C. A. 9th, April 29, 1947).

In that case, the Commissioner had contended that a transfer of stock was made (*a*) in contemplation of death or (*b*) to take effect in possession or enjoyment at or after death. The Tax Court decided the first issue and

found that the transfer was not made in contemplation of death. Believing that the Commissioner had abandoned contention (*b*), the Tax Court failed to pass upon the second issue.

The Circuit Court, holding that the Commissioner had not abandoned the second contention, reversed and remanded the case for a fact finding on that issue. The Circuit Court's opinion declared (p. 556 of Report):

> "Since it is the intent of Congress that such an issue of fact should be first determined by the Tax Court, we reverse its final determination that the shares be not included in the decedent's estate and remand the case to that court with instructions to make such determination. * * *
>
> "Reversed and remanded."

That ruling applies squarely to the instant case. A vital fact finding is lacking. As a minimum requirement, it is urged, an order of reversal and remand is appropriate so that the Tax Court may supply the missing fact finding.

CONCLUSION.

It is, therefore, respectfully submitted that for the foregoing reasons your Honorable Court should grant the Petition for Writs of Certiorari.

Respectfully submitted,

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SHAPIRO, CONNER, ROSENFELD & STALBERG,
By

HIRSH W. STALBERG,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 221

MORRIS EISENBERG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 222

HERMAN SCHAEFFER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 7a–29a) are reported in 5 T. C. 856. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 34) is reported in 161 F. (2d) 506.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 22, 1947. (R. 43, 44.) The petition for writs of certiorari was filed July 22, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the years 1940 and 1941, each of the petitioners was taxable under Section 22 (a) of the Internal Revenue Code with respect to the income of certain identical trusts created by him on January 3, 1940, for the benefit of each of his children, to which he purportedly transferred percentages of his interest in a certain partnership.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealing in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried

on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1940 ed., Sec. 181.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

* * * * *

STATEMENT

The facts as found by both the Tax Court and the court below may be summarized as follows:

In 1937, the petitioners entered into an oral agreement of partnership for the conduct of a retail furniture establishment under the name of "Bailey's Furniture Company." (R. 34.)

On December 30, 1939, they executed written articles of partnership, continuing the partnership from year to year, each partner to receive an annual salary. It was expressly provided that payment of the respective shares of profit was to be made only if and when the parties so determined. (R. 35.)

Three days later, on January 2, 1940, each of the petitioners created a separate trust for each of his minor children, the petitioner Eisenberg creating three and the petitioner Schaeffer four, to which each in the aggregate transferred fifty percent of his interest in the partnership. (R. 35–36.)

Each trust provided that its beneficiary could elect to become a partner upon reaching the age of forty, or upon reaching the age of thirty if the trustee died, and that if he was not admitted as a partner, or chose not to become a partner, he could either withdraw his share of the principal and income under conditions specified therein or elect to retain an inactive interest in the business. All income was to be accumulated until then, except that the trustee was empowered in his sole discretion to expend for or pay to the beneficiary any part of the trust fund prior to his attaining the age of thirty, or forty, years, as the case might be. (R. 36–37.)

Each trust also provided that the trustee could pledge any of the trust funds as collateral security

for loans and for use in the management and operation of Bailey's Furniture Company. (R. 37.)

On the day after the execution of the trusts, January 3, 1940, the petitioners, individually and as trustees, executed an addendum to the articles of co-partnership, purporting to make the various trusts members of the partnership and subjecting them to the partnership agreement. (R. 37–38.)

No services were rendered to the partnership by any of the children of either of the petitioners, except by Raymond Schaeffer during the period from January to December, 1941, for which he was paid. (R. 38.)

No distribution of either corpus or income of the trusts was made in 1940 or 1941, but the petitioners, as trustees, filed income tax returns for 1940 and 1941 in behalf of the trusts, reporting income of the Bailey Furniture Company which was credited to the respective capital accounts of the trusts on the books of the company. (R. 38.)

On these facts,[1] the Tax Court determined that, under Section 22 (a) of the Internal Revenue Code, as authoritatively construed in *Helvering*

[1] In 1943, the trusts were reformed under order of the Court of Common Pleas. The Tax Court, however, based its decision on the trusts as originally written on January 2, 1940. (R. 27a.) Its action in this respect was approved by the Circuit Court of Appeals. (R. 42–43.) No error is assigned by the petitioners on this account. Since no reference to the reformation of the instruments is made in the petition for certiorari, we have also attached no significance to it.

v. *Clifford,* 309 U. S. 331, the petitioners were taxable on all the income of the partnership business. The Tax Court made no finding as to the nature of the partnership. The court below assumed that it did not do so, perhaps because the decisions in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293, had at that time not been announced. (R. 40.)

The Circuit Court of Appeals regarded the general principles applied by the Tax Court as beyond dispute, namely that the grantor of a trust remains taxable on the trust income under Section 22 (a) when the benefits directly or indirectly retained by him blend imperceptibly with the normal concept of ownership, and that, moreover, the Tax Court's determination in this type of case, if supported by evidence, was conclusive upon the appellate court, regardless of whether it was inclined to draw the same conclusion or make the same inference. (R. 41.) In this connection, the court agreed with the expressions in *Hash* v. *Commissioner,* 152 F. (2d) 722, 725 (C. C. A. 4th), certiorari denied, 328 U. S. 838, rehearing denied, 328 U. S. 879, that in this field, particularly, each case turned on its own facts, and that the appellate court's function ceased when it determined that the record as a whole furnished substantial basis for the inferences drawn by the Tax Court. (R. 41–42.) The court below went on to say that, in its opinion, the Tax Court could reasonably have concluded, as it did, that the arrangements made

by the petitioners did not effect a change in their economic status, but multiplied, in form, a single economic unit. (R. 42.)

Accordingly, the court below affirmed the order of the Tax Court in each proceeding. (R. 43.)

ARGUMENT

Both the Tax Court and the Circuit Court of Appeals concluded that the case was ruled on its facts by *Helvering* v. *Clifford,* 309 U. S. 331. Both courts pointed out that, in view of the bundle of rights reserved by him in the trust fund, each petitioner, as an individual partner and as trustee, could during the taxable years 1940 and 1941 prevent the distribution of any partnership income and compel the trust to leave the income in and subject to the commercial hazards of the business until the termination of the trust. (R. 25a, 26a; 41, 42.) We submit that further review by this Court is not warranted.

1. The decision of the Circuit Court of Appeals is not in conflict with *Montgomery* v. *Thomas,* 146 F. (2d) 76 (C. C. A. 5th); *Commissioner* v. *Olds,* 60 F. (2d) 252 (C. C. A. 6th); *Armstrong* v. *Commissioner,* 143 F. (2d) 700 (C. C. A. 10th); or *Thomas* v. *Feldman,* 158 F. (2d) 488 (C. C. A. 5th), as the petitioners assert. (Pet. 5.) Each of these cases turned upon its own peculiar facts, which are essentially different from those here presented, and it is unnecessary to inquire here into the correctness of each of such decisions. As the court

below said, little can be accomplished towards ultimate determination of the tax liability, at least in this class of cases, by ferreting out analogous parts of other cases, particularly since no one fact is decisive. (R. 41.)

2. The petitioners also assert (Pet. 8) that the court below erred in holding the trusts in question invalid for tax purposes, "despite the Tax Court's failure to find that there was no actual partnership or that the trusts did not effect a change of ownership." Apparently the petitioners contend that implicit in the lower court's alleged holding that the trusts were invalid is the further holding that there was no actual partnership created in which the trusts, and hence the minor children, were partners.

The court below, however, did not hold the trusts to be invalid or that no partnership was created between the petitioners and the trusts. While it stated that the Tax Court had evidently concluded that the gifts in trust were not complete, the court below rested its holding on the ground that, on the facts in the case, the Tax Court could reasonably have reached the conclusion it did. And, as regards the alleged agreement of partnership between the petitioners and the trusts, or its validity, the court below made no reference thereto other than that the addendum to the article of partnership executed January 3, 1940, in effect, purported to make the various trusts members of the partnership and subjected them to the partner-

ship agreement (R. 37–38), and that, in deciding the case upon the authority of the *Clifford* case, the Tax Court had made no finding as to the nature of the partnership (R. 40).

The Tax Court did not hold the trusts to be invalid, and it made no finding as to the alleged membership of the trusts in the partnership. It was obviously unnecessary for the Tax Court to have done so, since it based its decision on the *Clifford* case, holding decisive the fact that the petitioners had reserved a right in both the corpus and income of each of the trusts. (R. 24a–26a.) Moreover, although the Commissioner had alternatively argued in the Tax Court that there was no valid partnership created between the petitioners and the trusts (R. 23a–24a), the Tax Court apparently did not consider it necessary to pass upon the validity of any agreement which the partnership may have entered into with the trusts, or whether under the addendum to the partnership articles, referred to above, a partnership had been created between the petitioners and the trusts.

3. Finally, the petitioners assert (Pet. 8–9) that, in holding them liable to the tax upon the income of the trusts, the court below "proceeded upon the reasoning of cases involving the interests of wives," particularly the *Clifford* case and *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293. None of these cases, say petitioners (Pet. 9–11), "considers the

rights of children as distinguished from those of wives in similar situations." In this connection, the petitioners point out (Pet. 9–11) that, in the *Montgomery, Olds, Armstrong,* and *Feldman* cases, *supra,* with which the lower court's decision in this case, holding the *Clifford* doctrine applicable, is alleged to be in conflict, the Circuit Courts of Appeals have sustained the validity for tax purposes of gifts of interests in partnerships to minor children.

On the foregoing premise, the petitioners conclude (Pet. 11) that, in view of the multitude of family partnership cases, the question whether the doctrine of the *Tower* and *Lusthaus* decisions is to be extended to situations involving children is likely to be of considerable public importance, and that it would, therefore, seem desirable that any doubts as to the validity or invalidity of partnerships with children be resolved by decision of this Court.

But, as we have argued, no such question is involved in the decision below. While there can be little doubt that the principle of *Tower* and *Lusthaus* is applicable to family partnerships of which minor children or trusts created for their benefit are members (cf. *Losh* v. *Commissioner,* 145 F. (2d) 456 (C. C. A. 10th); *Thorrez* v. *Commissioner,* 155 F. (2d) 791 (C. C. A. 6th); *Hash* v. *Commissioner, supra*), the question is not one which could properly be presented to this Court for review in this case. There is, therefore, no

occasion for this Court to review the decision of the court below in order to remand the case to the Tax Court for a finding as to "whether or not the trusts actually became partners," as the petitioners would have this Court do. (Pet. 12–13.)

CONCLUSION

For the reasons stated, the petition for writs of certiorari should be denied.

Respectfully submitted.

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